

Supreme Court No. 81068-1
Court of Appeals No. 59848-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Appellee,

v.

JEREMY GRANDE,
Defendant/Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SKAGIT COUNTY

The Honorable Dave Needy, Judge

APPELLANT'S REPLY BRIEF

David B. Zuckerman
Attorney for Appellant
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-1595

FILED
SUPREME COURT
STATE OF WASHINGTON
2008 JAN 24 A 9:47
BY DONALD R. CAMPBELL
CLERK

TABLE OF CONTENTS

| | |
|---|---|
| I. ARGUMENT..... | 1 |
| A. THE ARREST AND SEARCH OF MR. GRANDE VIOLATED THE FOURTH AMENDMENT | 1 |
| B. THE ARREST AND SEARCH VIOLATED ARTICLE I, SECTION 7 | 5 |
| II. CONCLUSION | 6 |

TABLE OF AUTHORITIES

Cases

| | |
|---|---------|
| <u>Dixon v. State</u> , 343 So.2d 1345 (Fla. App. 1977)..... | 2 |
| <u>Maryland v. Pringle</u> , 540 U.S. 366, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003)..... | 5 |
| <u>People v. Chestnut</u> , 43 A.D.2d 260, 351 N.Y.S.2d 26 (1974) | 3 |
| <u>People v. Erb</u> , 128 Ill. App.2d 126, 261 N.E. 2d 431 (1970)..... | 3 |
| <u>People v. Laird</u> , 11 Ill. App. 3d 414, 296 N.E.2d 864 (1973)..... | 3 |
| <u>People v. Wolf</u> , 15 Ill. App. 3d 374, 304 N.E.2d 512 (1973) | 3 |
| <u>State v. Cole</u> , 128 Wn.2d 262, 906 P.2d 925 (1995) | 4 |
| <u>State v. Compton</u> , 13 Wn. App. 863, 906 P.2d 925 (1995) | 1 |
| <u>State v. Day</u> , 161 Wn.2d 889, 168 P.3d 1265 (2007) | 6 |
| <u>State v. Hammond</u> , 24 Wn. App. 596, 603 P.2d 377 (1979) | 1, 4, 5 |
| <u>State v. Huff</u> , 64 Wn. App. 641, 826 P.2d 698 (1992) | 1 |
| <u>State v. Moore</u> , 161 Wn.2d 880, 169 P.3d 469 (2007) | 5 |
| <u>State v. Olson</u> , 175 Colo. 140, 485 P.2d (1971) | 2 |
| <u>State v. Ramirez</u> , 49 Wn. App. 814, 746 P.2d 344 (1987) | 4 |
| <u>State v. Rankin</u> , 151 Wn.2d 689, 92 P.3d 202 (2004) | 5 |
| <u>Wisconsin v. Secrist</u> , 224 Wis. 2d 201, 589 N.W. 2d 387, <u>cert. denied</u> , 526 U.S. 1140, 119 S. Ct. 1799, 143 L. Ed. 2d 1025 (1999)..... | 2 |
| <u>Ybarra v. Illinois</u> , 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979)..... | 2, 4, 5 |

Constitutional Provisions

Const., Art. I § 7..... 5

U.S. Const., Amend. 4 (Search & Seizure)..... 1

I. ARGUMENT

A. THE ARREST AND SEARCH OF MR. GRANDE VIOLATED THE FOURTH AMENDMENT

The question presented is whether the moderate smell of marijuana in a vehicle, standing alone, gives rise to probable cause to arrest all occupants of the vehicle. The State maintains that numerous cases from Washington and other jurisdictions have answered that question “yes.” Respondent’s Brief at 6-12.¹ In fact, the only Washington case to clearly adopt such a rule is that of Division Two in State v. Hammond, 24 Wn. App. 596, 603 P.2d 377 (1979). The other cases cited by the State are not directly on point.

In State v. Compton, 13 Wn. App. 863, 906 P.2d 925 (1995), a trooper detected a strong odor of marijuana coming from a car and then searched the driver. The Court did not suggest that anyone else was present in the car. Thus, there was no issue of individualized probable cause.

In State v. Huff, 64 Wn. App. 641, 826 P.2d 698 (1992), the officer did indeed arrest a passenger. But the arrest was not based solely on the smell of drugs in the car. Rather, the passenger made furtive gestures as

¹ This portion of the Respondent’s Brief is essentially “cut and pasted” from its Answer to Grande’s Motion for Discretionary Review. Grande’s Reply on Motion for Discretionary Review addresses the State’s arguments. For the Court’s convenience, however, Grande will repeat that briefing here.

the officer attempted to pull the car over, and then lied to the officer about her identity. Id. at 648. This suspicious behavior suggested that the passenger was involved in the illegal drug activity. (In fact, the officer could have arrested her solely for obstructing his investigation by lying about her identity.) Similarly, in State v. Olson, 175 Colo. 140, 485 P.2d (1971), the arrest of the passengers was based not only on their being present in a car but also on their individual, suspicious behavior. The Wisconsin Supreme Court has noted that both Huff and Olson turned on the suspicious behavior of the passengers and not merely on the general smell of marijuana. See Wisconsin v. Secrist, 224 Wis. 2d 201, 216, 589 N.W. 2d 387, cert. denied, 526 U.S. 1140, 119 S. Ct. 1799, 143 L. Ed. 2d 1025 (1999).

The remaining cases cited by the State are all from other jurisdictions, and were all decided prior to the United States Supreme Court decision in Ybarra v. Illinois, 444 U.S. 85, 91, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979), which established the requirement of individualized suspicion to support a drug arrest. See State's Response at 7. In fact, three of the cases cited by the State are from the Illinois state courts, which were clearly laboring under an unconstitutional standard prior to Ybarra. In any event, all but one of the cases are distinguishable.

In Dixon v. State, 343 So.2d 1345 (Fla. App. 1977), the officer "observed a great deal of smoke coming from the vehicle and as he approached it detected a strong odor of burning marijuana" before searching the driver. Thus, the occupants must have been actively

engaged in smoking marijuana. Here, by contrast, the moderate smell of marijuana – with no indication of smoke – could have lingered from a time long before Mr. Grande entered the car.

In People v. Wolf, 15 Ill. App. 3d 374, 304 N.E.2d 512 (1973), the officer found, in addition to the smell of marijuana, 16 baggies of marijuana and nearly \$3,000 in cash. This suggested a joint enterprise of drug dealing. The only issue apparently contested by the defendant was whether the officer properly entered the car in the first place in order to check the vehicle identification number. Id. at 375-76.

In People v. Laird, 11 Ill. App. 3d 414, 296 N.E.2d 864 (1973), the only issue was whether the smell of marijuana justified a search of a vehicle. Because the search turned up marijuana, the defendant driver did not contest that existence of probable cause to arrest him at that point. Here, by contrast, Mr. Grande was arrested immediately after the officer smelled marijuana, and the evidence at issue was found on his person during the search incident to arrest.

In People v. Erb, 128 Ill. App.2d 126, 261 N.E. 2d 431 (1970), the police could detect the smell of marijuana specifically emanating from Ms. Erb after she exited a car. Further, an officer saw her throw a packet into the bushes after the officers approached. “[D]efendant Erb’s suspicious movements and the finding of the packet near her, gave probable cause for her detention and search.” Id. at 134.

The majority opinion in People v. Chestnut, 43 A.D.2d 260, 351 N.Y.S.2d 26 (1974), does appear to endorse the proposition for which it is

cited. The dissenting opinion, however, foreshadows Ybarra's requirement of individualized probable cause. "While the record establishes probable cause that *someone* in the automobile *had been* in possession of marijuana, there is no probable cause for present possession since none of the occupants was smoking when the troopers stopped and approached the automobile." Id. at 263 (emphasis in original).

The State also relies on State v. Ramirez, 49 Wn. App. 814, 819, 746 P.2d 344 (1987), as a case allegedly following Hammond. While the Ramirez court did mention Hammond at one point, that was not necessary to its decision. The Ramirez court actually *suppressed* the evidence at issue, finding that the smell of marijuana did *not* justify the officers' search of a hotel room.

The State also relies on State v. Cole, 128 Wn.2d 262, 906 P.2d 925 (1995), for the proposition that the smell of marijuana creates probable cause for a search. In fact, the search warrant in Cole was based not merely on the smell of marijuana but also on an informant's tip that the defendant was growing marijuana and on power records consistent with a marijuana grow operation. Id. at 286. In any event, as the U.S. Supreme Court explained in Ybarra, probable cause to search a particular place does not give rise to probable cause to search or arrest every person who happens to be present at that place. Even assuming for the sake of argument that the officers in this case could have searched Ms. Hurley's car after detecting an odor of marijuana in it, that does not mean they had probable cause to arrest and search a passenger in that car.

Thus, the State's position in this case is truly supported by only one Washington case, State v. Hammond, and perhaps by one old case from another state. The issue presented in this case has never been addressed by this Court, has never been addressed by any Washington appellate court subsequent to the U.S. Supreme Court's decision in Ybarra, and has never been addressed under the standards of article I, section 7 of the Washington Constitution.

The State's arguments regarding Maryland v. Pringle, 540 U.S. 366, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003), are fully addressed in Appellant's Opening Brief at 9-11.

Thus, under Fourth Amendment jurisprudence, the arrest and search of Mr. Grande was unconstitutional.

B. THE ARREST AND SEARCH VIOLATED ARTICLE I,
SECTION 7

The State concedes that article I, section 7 of the Washington Constitution provides greater protection than the Fourth Amendment to passengers "when the driver has committed a traffic infraction or crime." Respondent's Brief at 15. That concession is particularly appropriate in view of recent decisions from this Court. See State v. Moore, 161 Wn.2d 880, 169 P.3d 469 (2007) (police improperly arrested passenger who was not wearing seat belt and gave a false name to police); State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004) (police may not request identification from passenger in lawfully stopped car). Cf. State v. Day, 161 Wn.2d 889,

168 P.3d 1265 (2007) (police cannot detain sole occupant of car even briefly to investigate mere parking infraction).

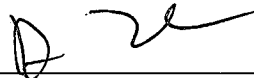
The State seeks to distinguish this case, however, by arguing that Trooper Hanger had individualized probable cause to arrest Mr. Grande. It bases that on Trooper Hanger's "extensive training" in detecting the odor of marijuana. Respondent's Brief at 16-17. Hanger's training, however, enabled him to determine only that marijuana had been smoked in Ms. Hurley's car at some point in the past. See Appellant's Opening Brief at 3-4. The Washington Constitution protects a citizen from being arrested simply because he enters a car in which someone smoked marijuana.

II. CONCLUSION

This Court should find that Mr. Grande's arrest was not supported by probable cause. It should therefore reverse the Superior Court and affirm the order of the District Court suppressing evidence and dismissing the charge.

DATED this 23rd day of January, 2008.

Respectfully submitted,



David B. Zuckerman, WSBA #18221
Attorney for Jeremy Grande


CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of this brief on the following:

Mr. Jeremy Grande
PO Box 774
Burlington, WA 98233

Ms. Toni G. Montgomery
Skagit County Prosecutor's Office
605 South 3rd Street -- Courthouse Annex
Mount Vernon, WA 98273

1/23/08
Date



Emily Knudsen